No. [redacted]

IN THE

United States Court of Appeals For the Ninth Circuit

SHIBO HAYASHI, an individual; and SHIBO HAYASHI, SHIZUYE OKIMOTO and FUGIO OKIMOTO, individuals d/b/a GREAT NORTHERN PEAT COMPANY,
Appellants,

v.

RED WING PEAT CORPORATION, a Texas Corporation,
Appellee.

and

SUNSHINE GARDEN PRODUCTS, INC., a California Corporation; WILSON & MEYER & CO., a Nevada Corporation; WESTERN PEAT COMPANY, LTD., a Canadian Corporation; LULU ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corporation; MEADOWLAND FARMS, LTD., a Canadian Corporation; WESTERN PEAT MOSS, LTD., a Canadian Corporation; NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and RICHMOND PEAT MOSS, LTD., a Canadian Corporation,
Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

BRIEF OF APPELLANT

FERGUSON & BURDELL
CHARLES S. BURDELL
THOMAS L. GREENAN
Attorneys for Appellant

Office and P.O. Address:
929 Logan Building
Seattle, Washington 98101

METROPOLITAN PRESS SEATTLE, WASH.

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No. 19343

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NATURE OF THIS APPEAL

This is an appeal from the Order of the United States District Court for the Western District of Washington, Northern Division, dismissing Red Wing Peat Corpora-

tion upon a finding that venue over Red Wing Peat Corporation in said district is improper. The action is one brought by the plaintiffs to recover damages pursuant to Section 4 of the Clayton Act (15 U.S.C.A. § 15) for violations of the antitrust laws of the United States (15 U.S.C.A. § 1, 2, 8, 13 and 13(a)).

STATEMENT OF THE CASE

On December 1, 1966, the trial court entered an Order dismissing Red Wing Peat Corporation from this action upon a finding that venue was improperly laid in the Western District of Washington (Document 67). Subsequently, on December 23, 1966, the plaintiffs filed Notice of Appeal from that Order (Document 68).

The facts which establish venue in this case are contained in the sworn statement of Mr. John Bell taken in Seattle, Washington, on February 17, 1964, which sworn statement is the attachment to the Affidavit of George Kargianis filed in this cause on May 2, 1966 (Document 44), together with the Affidavit of Thomas J. Greenan filed October 26, 1966 (Document 61), with attachment. Mr. John Bell is a resident of the Province of British Columbia in the Dominion of Canada and is the major shareholder in Northern Peat Moss, Ltd., a Canadian peat moss producer and one of the defendant companies in this case. In the following summarization of facts, the references will be to the pages of the Bell statement attached to the Affidavit of George Kargianis, unless it is otherwise indicated that the reference is to the transcript of proceedings before the court below.

The Canadian corporations, defendants in this case are the dominant processors of peat in Western Canada

and are the principal distributors of peat products in the Western area of the United States (5). They market approximately eighty-five percent (85%) of their products in the 11 Western States, principally in Washington, Oregon and California (6). They sell more peat in these three states than do all of their competitors combined.

During the period 1953 until about June 30, 1961, the defendants marketed their product jointly through a Canadian corporation called Canadian Peat Moss, Ltd. (CPML) (13). CPML was formed and used by the defendant producers to establish and to maintain market quotas and to fix and to stabilize the prices at which the defendants sold their products in the United States (13-19; 34-36). At the conclusion of each year the defendants shared the profits or losses of CPML in accordance with an agreed schedule of percentages (13-14).

During most of the period involved in this case, CPML marketed all of the peat moss produced by the Canadian defendant producers and sold said products in the United States through the defendants Wilson & George Meyer & Co. and Sunshine Garden Products, Inc. (15-19). These two firms had common ownership (11).

On or about June 30, 1961, a consent decree was entered in the United States District Court for the Northern District of California in a civil antitrust action brought by the Justice Department (Southern Division Civil No. 38606), which prohibited Sunshine Garden Products, Inc. from representing CPML (18-19). CPML was thereafter dissolved (18). Thereafter, Western Peat Company, Ltd. (referred to in the Complaint and hereinafter as "Old Western"), by agreement among the other defendant pro-

ducers replaced CPML as the marketing agent. "Old Western" then sold through Wilson & George Meyer & Co. The marketing structure remained the same as it had when products were sold through CPML. The defendant producers marketed their products through "Old Western," in accordance with market percentages allotted to each producer and they shared the profits or losses of "Old Western" in accordance with the same allocation percentages. This formula was the same as was used when CPML acted as marketing agent (19, 28-30; 61-64).

Mr. John Fleming was the manager of CPML, and during the years of existence of that organization he had authority from the various members and exercised that authority to dictate policy; i.e., the raising and lowering of prices, and the areas of market concentration (23, 24 and 25). When "Old Western" undertook to act as the marketing agent of the Canadian producers, Fleming continued to direct the policies of the marketing group (29).

In the Spring of 1963, the appellee, Red Wing Peat Corporation, a Texas Corporation, formed a corporation in Canada called Western Peat Moss, Ltd. ("New Western" in the Complaint and hereinafter). "New Western" purchased all of the assets of "Old Western" and of individual peat producers. "New Western" is a wholly owned subsidiary of Red Wing Peat Corporation, and Mr. John Dunfield is the president of both corporations. (Attachment to Affidavit of Thomas J. Greenan, Document 61). After the acquisition of the assets of "Old Western" by "New Western," the formal meetings eventually ceased

for the reasons that the American interests which had acquired the assets of "Old Western" expressed worry about antitrust violations and advised Fleming and his associates not to meet with the Canadian producers as a group but to continue operations as before (28).

In 1960, the plaintiffs commenced the production of their peat in Snohomish County, Washington, and distributed their product in Western Washington (20). Fleming implied to the Canadian producers that Wilson & Meyer & Co. could handle the problem arising from plaintiffs' competition (23). Pursuant to authority from the defendant producers, the prices for all of defendants' peat were fixed by Wilson & George Meyer & Co. and Fleming (23, 25). In order to meet this problem and to suppress the competition of the plaintiffs, a new size package was adopted and prices were lowered in Seattle and Renton, Washington, the area in which plaintiffs were a competitive factor. Losses incurred in selling at lower prices in competition with the plaintiffs were recovered by raising prices elsewhere (22-26). The defendants continued to sell at depressed prices in the market in which plaintiffs were attempting to sell, primarily Western Washington, until the plaintiffs discontinued business. At that time, the defendants raised their prices. The defendants' prices were never lowered in Eastern Washington, Oregon or California, areas in which the plaintiffs were not a competitive factor (39-45, 56).

After the formation of "New Western" and its acquisition of the assets of "Old Western," Fleming continued his activities for the marketing group. Fleming is an officer of Red Wing Peat Corporation and in that capacity

has appeared before the United States Tariff Commission, in connection with anti-dumping charges, on behalf of both Red Wing and "New Western" (Greenan Affidavit and attachment, Document 61).

The defendants, Lulu Island Peat Company, Ltd., Coast Peat Company, Ltd. and Blundell Peat Company Ltd. filed motions to dismiss on the grounds of lack of jurisdiction, improper venue and insufficiency of service of process (Document 35). After two hearings in open court (Reporter's Transcript of Record, May 6, 1966; Reporter's Transcript of Record, June 3, 1966, pages 1-52), the court denied those motions, relying on the statement of Mr. Bell attached to the Kargianis Affidavit which has been referred to throughout (Document 54). Subsequently, defendant Red Wing Peat Corporation moved to dismiss on the grounds of lack of jurisdiction, improper venue and insufficiency of service of process (Document 56). After the filing of memoranda and argument in open court (Reporter's Transcript, October 28, 1966, pages 1-26; and Reporter's Transcript, November 14, 1966, pages 1-4), the court determined that once venue had been challenged, the burden was upon the plaintiffs to prove proper venue pursuant to the applicable sections of the Clayton Act. The plaintiffs presented the court with the facts as aforesaid and requested the court to deny the motion of Red Wing until the plaintiffs had completed their trial preparation without prejudice to the right of Red Wing to renew its motion after all of the facts were known. (Plaintiffs' memoranda in opposition to the Red Wing motion, Documents 60 and 63). The court declined the request, suggesting appeal at this point while the record was simple (Reporter's Transcript, Octo-

ber 28, 1966, page 21, line 18—page 22, line 10).

SPECIFICATION OF ERRORS

The appeal specifies error on the part of the trial court as follows:

1. The court erred in ordering dismissal of the Red Wing Peat Corporation from this action, finding that venue over Red Wing Peat Corporation in this District was improper (Document 67).

2. The court erred in holding in its memorandum opinion that the court lacked jurisdiction over the person of Red Wing Peat Corporation (Document 72).

3. The court erred in holding in its memorandum opinion that venue as to defendant Red Wing Peat Corporation was improperly chosen because Red Wing did not reside in, was not found, did not have an agent in, was not an inhabitant of and did not transact business in the Western District of the State of Washington (Document 72).

4. The court erred in holding in its memorandum opinion that service of process on the defendant, procured in the State of Ohio, was insufficient (Document 72).

ARGUMENT ON APPEAL

It is the contention of appellants that the record before the trial court adequately established facts which support jurisdiction and venue in the Western District of Washington, Northern Division, and that the court should have denied the appellee's motion to dismiss without prejudice to appellee's right to renew the motion after all pretrial discovery has been completed.

I. Venue

At the trial level, the appellee contended, and the court found in its memorandum opinion and in its order dismissing Red Wing Peat Corporation, that venue in the Western District of Washington was improper because Red Wing is neither "found" in that district, nor does it "transact business" in said district. This having been found, the court concluded that service of process on Red Wing, outside the boundaries of the State of Washington, was invalid.

In cases of this sort, as the trial court recognized, the first question to determine is venue, because if venue is properly laid, then the question of service of process becomes relatively simple. This is demonstrated in the case of *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders, and Exhibitors' Association of America,* 344 F. 2d 960 (9th Cir. 1965). In that case, after a thorough discussion of the problem of venue, the court stated (p. 866):

> "Although, as agreed to by the Association, once venue is found to lie in the Southern District of California the matter of service becomes of minor import, we think that the service of process upon the Association's Regional Vice-President was sufficient."

This case is based upon Section 4 of the Clayton Act (15 U.S.C.A. 15) which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee."

Since the appellee is a corporation, Section 12 of the Clayton Act (15 U.S.C.A. 22) also applies. This section reads:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Section 12 of the Clayton Act (15 U.S.C.A. 22) provides that a suit under the antitrust laws against a corporation may be brought in any district in which the corporation "may be found or transacts business." Section 4 of the Clayton Act, however (15 U.S.C.A. 15) provides that such an action may be brought in any district in which the defendant is "found," but this section omits the words "transacts business." The courts have held that the omission of these words in Section 4 is not a limitation upon Section 12 but that, on the contrary, Section 12 was an enlargement of the special venue privileges provided in Section 4. This point was established in the 1925 decision of the United States Supreme Court entitled *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L.Ed. 699. In that case, the Supreme Court expressly stated that the purpose of Section 12 was to enlarge the jurisdiction of the district courts so as to establish venue not only in a district in which a defendant corporation resides or is "found" but also in any district in which it transacts business, even though it might not reside or be found in said district.

The court went on to say that in the event venue is established by the transaction of business, process may be issued to and served in any district in which the corporation either resides or is "found." See also, *American Football League v. National Football League*, 27 F.R.D. 264 (D.C. Md. 1961); *Riss & Co. v. Association of Western Railways*, 162 Fed. Supp. 69 (D.C. 1958); *Boston Medcal Supply Co. v. Brown & Connolly*, 98 Fed. Supp. 13 (D.C. Mass. 1951), affirmed in 195 F.2d 853 (1 Cir. 1951).

A. Liberal Construction of Special Venue Statutes.

The special venue statutes provided in the Clayton Act were intended to remove the limitations upon venue which were applicable in diversity cases. See *Thorburn v. Gates*, 225 Fed. 613 (D.C. N.Y. 1915). Thus it has been repeatedly declared that these special venue provisions were intended to broaden the range within which an injured plaintiff may sue for damages, beyond that which is generally applied in cases where no special venue statute is applicable. See *United States v. Scophony Corp.*, 333 U.S. 795; *Cinema Amusements v. Loew's Inc.*, 85 Fed. Supp. 319 (Del. 1949); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Cal. 1957); *Anderson-Friberg, Inc. v. Justin R. Clary & Son*, 98 Fed. Supp. 75 (S.D. N.Y. 1951). The object of the special venue statutes is to provide a plaintiff with a wide choice in the selection of venue so that an injured party may institute an action with the least expense possible. See *Cinema Amusements v. Loew's, Inc.*, 85 Fed. Supp. 319 (Del. 1949). Indeed, because enforcement of the antitrust laws is considered so vital a phase of our society, the law has

been interpreted in a manner designed to provide an injured party a ready and convenient forum, despite the fact that this might result in hardship to the defendant or defendants in cases based upon other laws and upon the general venue statutes. See *Ferguson v. Ford Motor Co.*, 77 Fed. Supp. 425 (D.C. N.Y. 1948); *Green v. United States Chewing Gum Mfg. Co.*, 224 F.2d 369 (10 Cir. 1955); *United States v. National City Lines*, 334 U.S. 573, 92 L.Ed. 1584; *Sharp v. Commercial Solvents Corp.*, 232 Fed. Supp. 323 (D.C. Tex. 1964).

The trend of the decisions is to permit the plaintiff to bring his action in that district where his injury took place, regardless of technical legal concepts and literal definitions of the words in the special venue statutes See *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey*, 104 F.2d 659 (2 Cir. 1939); *Electric Theatre Co. v. 20th Century-Fox Film Corp.*, 113 Fed. Supp. 937 (D.C. Mo. 1953); *Goldlawr, Inc. v Shubert*, 169 Fed. Supp. 677 (E.D. Pa. 1958). In the *Goldlawr* case the court expressed the point by stating that the language of Section 22 of the Clayton Act broadened the concept of "found," even in the case of individual defendants, and provided for the injured party "the right to bring suit . . . in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."

So, in order to further the legal and philosophic objectives of the antitrust laws and aid in their enforcement, it has been invariably held that the concept of "transacting business" for venue purposes under the antitrust laws requires less business activity than is required to provide

venue in cases based on other laws. The term "transacting business" is construed in its practical, not its technical, sense, and from the commercial rather than a legal point of view. *Hansen Packing Co. v. Armour & Co.*, 16 Fed. Supp. 784 (D.C. N.Y. 1936); *Friedman v. U.S. Trunk Co.*, 30 F.R.D. 148 (D.C. N.Y 1962); *Crawford Transport Co. v. Chrysler Corp.*, 191 Fed. Supp. 223 (D.C. Ky. 1961); *Bertha Bldg. Corp. v. National Theatres Corp.*, 140 Fed. Supp. 909 (D.C. N.Y. 1956) reversed on other grounds, 248 F.2d 833; *Riss & Co. v. Associaton of American Railroads*, 24 F.R.D. 7 (D.C. 1959); *Sunbury Wire Rope Mfg. Co. v. U.S. Steel Corp.* 121 Fed. Supp. 425 (D.C. Pa. 1955); *Ohio-Midland Light & Power Co. v. Ohio Brass Co.*, 221 Fed. Supp. 405 (D.C. Ohio 1962); *Rhode Island Fittings Co. v. Grinnell Corp.*, 215 Fed. Supp. 198 (R.I. 1963). Indeed, the Court of Appeals for the Ninth Circuit has declared that one act may be sufficient to provide venue under the damage provisions of the antitrust laws. See *Courtesy Chevrolet, Inc. v. Tennesee Walking Horse Breeders' & Exhibitors' Association of America*, 344 F.2d 960 (9 Cir. 1965).

To provide venue under these statutes it is not necessary that the defendant be physically present in the district in which the suit is instituted. *Freeman v. Bee Machinery Co.*, 319 U.S. 448, 87 L.Ed. 1509. In this connection even where the courts have based venue on the term "found" it has been held that that word, in the sense of venue, does not require physical presence in the jurisdiction. *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964). Moreover, the term "transacting business" as interpreted under these special venue statutes, does *not* require that there be an agent in the

district in which the suit is instituted. See *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L.Ed. 699; *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation*, 46 F.2d 623 (1 Cir. 1931); *Wentling v. Popular Science Pub. Co.*, 176 Fed. Supp. 652 (D.C. Pa. 1959).

The burden of proof to establish venue in this type of case, as in all cases, is upon the plaintiff. It is frequently impossible, however, to meet this burden at the outset of a case. If it were the inflexible rule that this burden must be met once and for all at the very outset of the case and prior to any discovery, then a defendant in any case could defeat the right of an injured party to bring his action in an appropriate district merely by the filing of contravening affidavits. Accordingly, final determination of the issue of venue is frequently deferred until the facts concerning venue have been developed to such a degree that the court, to its satisfaction, can intelligently make a ruling one way or another. In the case of *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 208 F. Supp. 943 (D.C. Ill. 1962) Judge Robson, after disposing of a challenge to service of process declared:

> "However, plaintiff must still show that venue in this district, as provided for in Section 15, is proper. Therefore, no ruling will be made on defendants' motions to dismiss pending completion of plaintiff's pretrial discovery as to venue."

Throughout the proceedings leading up to the order dismissing Red Wing Peat Corporation from this action, the appellants urged the trial court to give them the opportunity to fully develop the facts, by way of pretrial

discovery, prior to ruling on the motion. The court was of the opinion that once venue had been challenged, it was incumbent upon the plaintiff to clearly establish the facts supporting venue.

A number of decisions have observed that it is extremely difficult, if not impossible, to determine the question of venue prior to having access to all the facts on the question of whether a defendant "transacts business" or is "found" within the district. Accordingly, these courts have denied motions identical to the one involved in this appeal until the plaintiff has had a complete opportunity to inquire into all facts supporting venue.

The case of *Permagent v. Frazer*, 93 F. Supp. 9 (E.D. Mich. 1949) involved a similar situation, wherein a parent corporation was moving to dismiss on the grounds of mislaid venue, claiming no connection with its wholly owned subsidiary. Therein (p. 12) the court observed:

> "There has been a change in the attitude of the courts towards this much debated and perplexing question that has been before our tribunals for years and there is a tendency now to cut through the maze of corporate appearances to arrive at the true status and relationship. The fiction of corporate entity is no longer controlling. It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose. But if the separate corporation is actually so attached to the parent that the parent is in fact doing business in this state then the court must not permit vociferous contrary claims of the parent to prevail."

The court then went on to deny the motion to dismiss, without prejudice to the parent's right to renew the motion when all the facts had been established. Each of the fol-

lowing cases holds that these matters should be left for decision until after the completion of pretrial discovery:

School Dist. of Philadelphia v. Kurtz Bros., 240 F. Supp. 361 (D.C. Pa. 1965);

Ziegler Chemical & Mineral Corp. v. Standard Oil Co. of Cal., 32 F.R.D. 241; (D.C. Cal. 1962);

Halewia Theatre Co. v. Forman, 37 F.R.D. 62 (D.C. Hawaii 1965);

State of Cal. v. Brunswick Co., 32 F.R.D. 36 (D.C. Cal. 1961);

Spohn v. United States, 16 F.R.D. 240, 241 (S.D. N.Y. 1954);

General Industries Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559 (E.D. N.Y. 1961);

Anderson-Friberg, Inc. v. Justin R. Clary & Son, 98 F. Supp. 75 (S.D. N.Y. 1951);

Hawn v. American S.S. Co., 26 F. Supp. 428 (W.D. N.Y. 1939);

Noerr Motor Freight v. Eastern R.R. Presidents Conference, 113 F. Supp. 737 (E.D. Pa. 1953);

Kierulff Associates v. Luria Brothers & Company, 240 F. Supp. 640 (S.D. N.Y. 1965);

Ferraioli v. Cantor, 259 F. Supp. 842 (S.D. N.Y. 1966);

Collins v. New York Central System, 327 F.2d 880 (D.C. Cir. 1963).

B. Facts Supporting Venue

As has been shown earlier, continuously, since 1953, the defendant peat moss producers have engaged in a combination and conspiracy to establish and maintain market quotas and to fix and stabilize prices at which their products were sold in the United States. At the conclusion of each year, these defendants have shared in the

profits and/or losses of their combination in accordance with an agreed schedule of percentages. This combination has operated, at various times, through the vehicles of Canadian Peat Moss, Ltd. (CPML), Western Peat Moss, Limited ("Old Western") or Western Peat Company, Ltd. ("New Western"). Mr. John Fleming has been the individual directing the policies of the combination, in all of its various forms, and he has been, at one time or another, the manager of CPML, and an officer of "Old Western" and "New Western."

In 1963, the appellee, Red Wing Peat Corporation, formed "New Western," and through the instrumentality of that company, acquired all of the assets of "Old Western." "New Western" is a wholly owned subsidiary of Red Wing, and Mr. John Dunfield is the president of both corporations. Mr. Fleming is also an officer of Red Wing.

In his sworn statement which is attached to the Kargianis Affidavit filed in opposition to certain of the defendants' motions to dismiss (Document 44), Mr. John Bell, president of one of the defendant producers, has this to say about the situation of the Canadian combination after the acquisition of the assets of "Old Western" by American interests:

> "We had some spasmodic meetings after Western Peat Moss became the sales organization, and after April of 1962 we had no meetings at all, and the reasons for that were because some American interests bought out Western Peat, and they were worried to death about any antitrust legislation and advised Fleming and Gilley to not talk to us as a group but to continue in the same manner." (28)

The appellee has filed an affidavit in support of its

motion to dismiss (Document 57) in which it contends, in very general terms, that it does not do business within the jurisdiction of the Western District of Washington, and, particularly, that it does not maintain any agent in the State of Washington. The affidavit is drawn entirely in terms of conclusions of law, rather than statements of fact, but it is the basis upon which the motion to dismiss was granted.

The appellants contend that the allegations of their second amended complaint, charging that Red Wing participated in the conspiracy to maintain and fix prices and to allot markets, together with the facts set forth above, are more than sufficient, at this stage of the proceedings, to defeat a motion to dismiss the action based upon improperly laid venue.

C. Co-Conspirator Doctrine

In addition to the foregoing, the trial court could have determined that venue was properly laid in the Western District of Washington based upon the co-conspirator doctrine which has previously been enunciated by this court.

In *Guisti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (9th Cir., 1946), *cert. den., Triumph Explosives v. Guisti,* 329 U.S. 787 (1946), the court expressly stated in reference to substituted service of process on the California Secretary of State, where the co-conspirator resided outside the state:

> "The California members of the conspiracy were agents of Triumph and the conspiracy's attempt to destroy appellant's business. Triumph was in Cali-

> fornia acting through such agents, just as it would have been if it had employed a group of agents there continuously. . . ." (p. 352)

Subsequently, in *DeGolia v. Twentieth-Century Fox Film Corp.*, 140 F. Supp. 316 (1954), the trial court was quite explicit in its avowal of the co-conspiracy doctrine:

> "The defendants base their motions on the contention that they are not inhabitants of California, nor are or ever have been transacting business in this State. Plaintiff, on the other hand, while admitting that defendants are not inhabitants of California, nor are authorized to do business here personally, alleges that defendants do business in the State through the agency of their local co-conspirators. If the conspiracy is established, defendants are doing business in this State." (p. 317)

The court in the *DeGolia* decision went on to say that *Guisti* established the law of the Ninth Circuit.

II. Service of Process

The appellants obtained service on Red Wing Peat Corporation by serving it at company offices in the State of Ohio. (Marshal's Return of Service—Document 26). Rule 4(e) of the Federal Rules of Civil Procedure provides:

> "(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. *Whenever a statute or rule of court of the state in which the District Court is held provides* (1) *for*

service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, *service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."*

In connection with the foregoing rule, the service statutes of the State of Washington (Revised Code of Washington, Section 4.28.185) provide:

"4.28.185. Personal service out of state—Acts submitting person to jurisdiction of courts—Saving. (1) Any person, whether or not a citizen or resident of this state who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this state; . . ."

This statute further provides that service of process may be made by personally serving the individual outside the state.

Section 4.28.185 of the Washington statutes is commonly referred to as the "Long Arm" statute and statute or statutes which are the same or similar in substance are continually in use throughout the United States both in state and federal courts.

The rules concerning service of process are not designed to provide technical and legalistic barriers to the institution of suits for damage where one has been injured. Their purpose is to provide notice to the party being sued, in sufficient detail and by a method sufficient-

ly timely and fair, to enable the defendant to appear and present a defense. See *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964); *Grooms v. Greyhound Corp.*, 287 F.2d 95 (6 Cir. 1961); *Tarbox v. Walters*, 192 Fed. Supp. 816 (D.C. Pa. 1961). That purpose has been accomplished in this case. As indicated in decisions discussed earlier in this memorandum, once venue has been established, then the right to bring the action in the selected district is also established, and the rules relating to service of process are of minor importance provided that they adequately inform the defendant of the nature of the action and the fact that he is being sued so that he may appear and submit his defense.

It is anticipated that appellee may contend that Section 12 of the Clayton Act somehow limits or repeals the operation of the Federal Rules of Civil Procedure insofar as service of summons in antitrust cases is concerned. Such is not the case. In *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 208 Fed. Supp. 943 (D.C. Ill. 1962), it was specifically held that service as provided by the Federal Rules of Civil Procedure was proper in an antitrust case and approved service of summons in the method provided for by the law of the State of Illinois. Other antitrust decisions have also approved use of state statutes as a method of service of summons. See, for example: *Maternity Trousseau, Inc. v. Maternity Mart of Baltimore, Inc.*, 196 Fed. Supp. 456 (D.C. Md. 1961); *Crawford Transport Co. v. Chrysler Corp.*, 191 Fed. Supp. 223 (D.C. Ky. 1961); *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964); *Massey-Ferguson Ltd. v. Intermountain Ford Tractor Sales Co.*, 325 F.2d 713 (10 Cir. 1962).

CONCLUSION

Appellants believe that at this juncture, prior to any discovery in this case, the court must reverse the trial court and deny the motion of Red Wing Peat Corporation to dismiss. The facts as now established are that Red Wing formed "New Western" for the purpose of exercising its option to purchase the assets of "Old Western" and that from and after the date of that acquisition it has used "New Western," its wholly owned subsidiary, as the vehicle for collusion, price-fixing and market allocation among the Canadian producers. As a *prima facie* case, this is more than sufficient. The motion should be denied without prejudice to appellee's right to renew it after pretrial discovery has been completed.

Respectfully submitted,

FERGUSON & BURDELL
CHARLES S. BURDELL
THOMAS J. GREENAN
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS J. GREENAN
Of Attorneys for Appellant